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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 592

MURRAY B. BAKER
and
VICTOR O. GATES, SR.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Murray B. Baker and Victor O. Gates, Sr., respectfully pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled cause on July 28, 1966.

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Pennsylvania is reported in 241 F. Supp. 272. The opinion of the United States Court of Appeals for the Third Circuit (Appendix, A 1) is unreported as of the date of this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on the 28th day of July, 1966 (Appendix, A 10). A timely petition for re-hearing was filed on August 11, 1966 and was denied on August 25, 1966. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. May a search warrant be issued based upon oral communications to the magistrate of facts not contained in the sworn written affidavit?

2. Where a search warrant issued by a state magistrate authorizes the seizure of specifically named articles of gambling paraphernalia, is the seizure of other articles, such as business records, an unreasonable search and seizure under the 4th Amendment?

3. Is the shipment of sweepstakes tickets and descriptive literature in interstate and foreign commerce prohibited under U. S. Code Title 18, Section 1953 (a) subparagraph (c) of the criminal code, which prohibits the shipment in interstate and foreign commerce of any records, paraphernalia, ticket, certificate, bills, slips, token, paper, writing, or other device used or to be used, or adapted, devised, or

designed for use "in a numbers, policy, bolita or similar game"?

4. Is the exception contained in U. S. Code Title 18, Section 1953 (b) (2) applicable to the Republic of Haiti where the use of such betting materials is legal?

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTE INVOLVED

Act of September 13, 1961, 75 Stat. 492, U.S.C. Title 18, Section 1953:

"Interstate transportation of wagering paraphernalia

"(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any records, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both.

"(b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication.

"(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or The District of Columbia."

STATEMENT OF THE CASE

An Indictment was returned in the United States District Court for the Middle District of Pennsylvania charging the defendants, in Counts I and II with violation of Title 18 U.S.C., Sections 1953(a) and 2, and in Count III with violation of Title 18 U.S.C. Section 371.

The first two counts charge violation of the Interstate Transportation of Wagering Paraphernalia Statute and the Aiding and Abetting Statute and the third count charges violation of the Conspiracy Statute.

The defendants, upon arraignment, entered a plea of Not Guilty.

Prior to trial, defendants moved to suppress the use as evidence of certain property seized on or about the 8th day of January 1963 from the premises of the Industrial Press, located at Room 115 Telegraph Building, Harrisburg, Pennsylvania upon the grounds that the search and seizure was unreasonable, illegal, and invalid (R 7a).

After Hearing, the Court, on May 6, 1964, denied defendants' motion (R 57a).

On December 14, 1964 the case was called for trial. Defendants waived their right to a jury trial and the case was tried upon a Stipulation of Facts (R 58a) in which it was agreed in substance that:

That on July 23, 1962 and July 30, 1962, defendants caused to be transported from Harrisburg, Pennsylvania to Comataire, S. A., a corporation, Port-au-Prince, Republic of Haiti, certain books of lottery tickets and writings which were to be used and were designed for use in a lottery based upon the outcome of a sporting event, to-wit, the running of the International Horse Race at Laurel, Maryland on November 12, 1962 (R 59a, 60a).

Attached to the Stipulation is a sample book of the lottery tickets and allied papers printed at Industrial by defendants immediately prior to the shipments made on July 23, 1962 and July 30, 1962, which book it was agreed is representative of the books of lottery tickets shipped by defendants, Baker and Gates as aforesaid (R 61a).

That the aforementioned books of lottery tickets and writings were printed by the defendants for the "Republic of Haiti Welfare Fund Sweepstakes" which was operated by the Port-au-Prince, Haiti Corporation known as "Comataire, S.A." a corporation incorporated under the laws of the Republic of Haiti (R 61a).

That the Republic of Haiti Welfare Fund Sweepstakes is a legally constituted sweepstakes lottery under the laws of the Government of Haiti and is under the control of an agency of the Haitian Government known as "Le Lotterie de l-Etat Haitian" (the lottery of the Republic of Haiti) (R 62a).

That on January 8, 1963, Pennsylvania State Police and Federal Officers under authority of a search warrant issued to Detective Sergeant Robert L. McCartney, Pennsylvania State Police, by Alderman Elizabeth A. Wagner of the city of Harrisburg, Pennsylvania on the same date, entered the Industrial Press, Room 115 Telegraph Building, Harrisburg, Pennsylvania and seized:

> Printed books of lottery tickets, slips, papers and writings, which had been printed by Industrial Press, and were to be used and designed for use in a lottery based upon the outcome of a sporting event, to wit, running of the International Horse Race at Laurel, Maryland, on November 12, 1962.

A freight bill (Exhibit A attached to the Stipulation) evidencing the shipment of July 23, 1962.

A freight bill (Exhibit B attached to the Stipulation) evidencing the shipment of July 30, 1962.

Numerous plates used for printing books of lottery tickets, slips, papers and writings as described above (R 62a).

As a result of the entry made and evidence seized at Industrial on January 8, 1963, by Pennsylvania State Police and Federal Officers aforesaid, further investigation was conducted by Agents of the Federal Bureau of Investigation and the stipulated facts were developed (R 62a).

At the conclusion of the evidence, defendants renewed their motion to suppress and also moved for Judgment of Acquittal (R 73a) in that:

The Government failed to carry its burden of proof by showing beyond a reasonable doubt that the defendants were guilty of the crime for which they have been indicted.

That the transportation of the betting materials comes within an exception to the Statute.

On April 30, 1965 the Court entered its Order denying Defendants' Motion to Suppress and Motion for Judgment of Acquittal and found defendants Baker and Gates guilty as charged on all Counts of the Indictment (R 83a).

The Court of Appeals affirmed on July 28, 1966 on the grounds that:

(1) The search and seizure was valid since 'the printing of lottery tickets was illegal***

consequently the tickets were subject to a reasonable search and seizure."

(2) That the proof showed that the Haiti Welfare Fund Sweepstakes was similar to policy, consequently the shipment of the sweepstakes material was prohibited by the section of the Act prohibiting the shipment of materials concerning numbers, policy, bolita or similar game.

(3) That the transportation of the materials does not come within the exception of U.S.C. Title 18 Sec. 1953 (b) (2) because: "The shipments in question do not come within this subsection for two reasons: One, the lottery tickets were no more 'betting materials to be used in the placing of bets or wagers on a sporting event' than are the materials used in a numbers game. * * * And two, the word 'State', as used in the subsection * * * means one of the United States, and not a country in the International sense."

Petition for re-hearing was denied on August 25, 1966 without opinion.

REASONS FOR GRANTING WRIT

I

The ruling of the District Court and its affirmance by the Court of Appeals that a search warrant may be issued based upon oral communications to the magistrate of facts not contained in the sworn written affidavit is in conflict with other Courts of Appeal and apparently this Court.

II

The ruling of the District Court and the Court of Appeals, that where a search warrant issued by a state magistrate authorizes the seizure of specifically named articles of gambling paraphernalia, the seizure of other articles, such as business records, is a reasonable search and seizure under the 4th Amendment, is erroneous and in apparent conflict with the applicable decisions of this Court and other Circuits.

III

The ruling by the District Court that the shipment in interstate and foreign commerce of materials concerning the Republic of Haiti Welfare Fund Sweepstakes came within that section of the Act prohibiting the transportation of material devised, or designed for use in, a numbers, policy, bolita or similar game, and the holding of the Court of Appeals that the materials transported concerned a lottery similar to policy (and consequently embraced under the same section of the Act) is contrary to the intent of Congress and the specific language of the statute and calls for the exercise of this Court's power of supervision.

IV

The ruling of the District Court and the Court of Appeals that the transportation of the sweepstakes materials did not come within the exception contained in U.S. Code Title 18, Sec. 1953 (b) (2) is erroneous and calls for the exercise of this Court's power of supervision.

ARGUMENT

I

The ruling of the District Court and the Court of Appeals that the contents of the written affidavit supporting a complaint for a search warrant can be buttressed by the oral statements of the affiant to the magistrate so that the magistrate could conclude that the informant, un-named in the affidavit, was reliable, is erroneous and in conflict with *Poldo v. United States*, C.A. 9, 55 F.2d 886 (1932); *United States v. Keleher*, 2 F.2d 934, 55 App. D.C. 132 (1924); and *United States v. Interbartolo*, D.C. Mass, 192 F. Supp. 587 (1961), which expressly held:

> "The oral information given by Sawtelle to the commissioner before the warrant of arrest was issued cannot be invoked to buttress the complaint."

The ruling in question likewise seems to be in apparent conflict with this Court's rulings in *Giordenello v. United States*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed. 2d 1503 (1958), and *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964), where the court noted in a footnote (p. 109):

> "If the fact and results of such a surveillance had been appropriately presented to the magistrate, this would, of course, present an entirely different case."

Without the oral statements the affidavit in support of complaint for search warrant is insufficient on its face to show probable cause for the issuance of a search warrant, as the facts would be stale, *Schoeneman v. United States*, 317 F.2d 173, 115 U.S. App.

D.C. 110 (1963), and there was no basis upon which the magistrate could find that the unnamed informant was credible or his information reliable, as required by *Aguilar v. Texas, supra.*

II

The District Court and the Court of Appeals ignored the question of the seizure of business records (freight bills) not described in a warrant which specifically authorized the seizure of named articles of gambling paraphernalia.

In the Stipulation of Facts before the trial court it was agreed that certain freight bills were seized in the Industrial Press during the execution of the warrant and that as a result of this seizure further investigation was conducted by agents of the Federal Bureau of Investigation and the facts stipulated to were developed.

This seizure under the warrant is contrary to the Fourth Amendment to the Constitution of the United States and the decisions of this Court in *United States v. Lefkowitz*, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877 (1932); *Marron v. United States*, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927); *Gouled v. United States*, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647 (1921), and is in conflict with the holding of the Court of Appeals for the 9th Circuit in *Woo Lai Chun v. United States*, 274 F.2d 708 (1960), where a warrant authorized the search of the defendant's premises for "medicinals and herbs made in China" and certain letters mentioning herbs were found and seized, the Court held, "The letters seized were not described in the search warrant. They were improperly seized unless they were instrumentalities of the crime itself."

III

The indictment under which the defendants were convicted accused the defendants of transporting wagering materials in interstate and foreign commerce "knowing that said books of lottery tickets, slips, papers and writings were used, to be used, and adapted, designed and devised for use in a numbers, policy, bolita or similar game based upon the outcome of a sporting event," clearly accusing defendants of violating Title 18 U.S.C., Section 1953 (a) (c).

The only conclusion that can be reached from the Stipulated Facts upon which defendants were tried is that the materials transported were lottery materials in the nature of a wagering pool based on the outcome of a sporting event, and the Court of Appeals recognized, from the Exhibits, that "The lottery was to be patterned after the Irish Sweepstakes." (Appendix, A)

The ruling of the District Court that, because the materials were lottery materials, the defendants were properly convicted of the crime under which they were indicted, and the ruling of the Court of Appeals that the materials transported concerned a lottery similar to "policy" were erroneous.

The District Court and the Court of Appeals have refused to recognize that Congress dealt with specific forms of gambling in specific sections of the statute in question.

The legislative history of this statute shows that it was not the intent of Congress that it become a dragnet. Only three types of gambling were included and Congress did not include them in a catch-all provision but enumerated them specifically in three distinct sub-sections, that is, (a) bookmaking; or (b) wagering pools with respect to a sporting event; or

(c) in a numbers, policy, bolita, or similar game. Petitioners respectfully direct the Court's attention to the use of the conjunction "or" in the division of the sub-sections.

In the hearings before Subcommittee #5, Committee on the Judiciary, House of Representatives, 87th Congress, 1st Session, on H.R. 6571 (pp. 350-352 inclusive), the embrace of this law was minutely dissected.

The Assistant Attorney General, in answer to a question as to whether or not sweepstakes would be included in the law, used language that could not be misunderstood when he defined a sweepstakes as a wagering pool with respect to a sporting event. He said:

> "Mr. Miller: Sweepstakes? I would say not. Well now, wait a minute. The Irish Sweepstakes, I would say yes, because there is a wagering pool with respect to a sporting event. Yes. Yes. It would be included." (p. 352)

Thus, sweepstakes were included under subsection (b) of the statute concerning wagering pools with respect to a sporting event and not under subsection (c) concerning numbers, policy, or bolita. Petitioners were indicted under subsection (c).

Since this is a case of first impression, it is respectfully urged that this Court exercise its power of supervision.

IV

United States Code Title 18, Section 1953 contains exceptions and provisos which read, in part, as follows:

"(b) This section shall not apply to* * *
(2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State * * *."

It is petitioners' position that the betting materials caused to be transported were to be used and were designed for use in a sweepstakes based upon the outcome of a sporting event, to-wit, the running of the International Horse Race at Laurel, Maryland on November 12, 1962, and that such betting is legal under the statutes of the Republic of Haiti.

The exempting paragraph of the statute excepts from the condemnation of the statute the transportation of such materials into a "State" in which such betting is legal under the statutes of that "State."

Since the condemnation is to both interstate and foreign commerce, it follows logically that the exception applies to both interstate and foreign commerce and that, therefore, the term, "State," is used in its generic sense, meaning independent political entity.

The exception of the transportation to "any State" should be interpreted, taking into consideration the general intent of the Congress, which was to outlaw from interstate and foreign commerce those articles which were to be used and designed for use in violating the laws of the place of ultimate destination.

The paraphernalia was shipped in foreign commerce to the Republic of Haiti, a "State" as defined by International Law, and since these betting materials had been specifically ordered for shipment to the Republic of Haiti, where they could be legally used in the placing of bets or wagers, it follows that

the exception in the statute applies to the transportation of these materials to any state, domestic or foreign.

No other interpretation would be in harmony with the general purposes of the statute and to interpret it to mean "State of the United States" would render the law involved unconstitutional as violating the due process clauses of the Fifth Amendment, since the law would be an arbitrary and unreasonable regulation, creating a distinction in the treatment of two acts where no difference in fact exists.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15572

UNITED STATES OF AMERICA

v.

MURRAY B. BAKER AND VICTOR O. GATES, SR.

MURRAY B. BAKER,

Appellant.

No. 15573

UNITED STATES OF AMERICA

v.

MURRAY B. BAKER AND VICTOR O. GATES, SR.

VICTOR O. GATES, SR.,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued February 10, 1966.

Before: McLAUGHLIN, FORMAN AND GANEY, *Circuit Judges.*

OPINION OF THE COURT

(Filed July 28, 1966)

By GANEY, *Circuit Judge.*

Appellants were indicted under a three-count indictment. The first two were under sections 1953(a) (interstate transportation of wagering paraphernalia) and 2

(aiding and abetting) of the Criminal Code, 18 U.S.C.A. §§ 1953(a) and 2. The third count charged them with conspiring to commit the crimes set forth in the first two counts in violation of § 371, the general conspiracy section of the Code. Before trial appellants moved to suppress the use as evidence, books of lottery tickets seized by State officers on January 8, 1963, from the premises of the Industrial Press located in the Telegraph Building, and on February 7, from a one-story garage, in Harrisburg, Pennsylvania. The ground for the motion was that the seizures, though pursuant to search and seizure warrants, were unreasonable. A hearing was held on May 4, 1964, and the motion was denied two days later. When the case was called for trial, appellants waived their right to trial by jury and agreed that the court decide their case upon a stipulation of facts. They also renewed their motion to suppress. The court, in an opinion, again denied the motion to suppress, denied their motion for judgment of acquittal and found each of the appellants guilty on all three counts of the indictment. 241 F. Supp. 272 (M.D. Pa. 1965). Each appellant has appealed separately. We treat both appeals as though they were one.

Appellants admit they shipped lottery tickets into interstate commerce, and caused them to be shipped in that commerce, that the tickets were to be used in a lottery to be operated in the Republic of Haiti and that the winning buyer or buyers of those tickets at two dollars each were to be determined from the position in which horses finished in The International horse race held at Laurel, Maryland, in November, 1962. The lottery was to be patterned after the Irish Sweepstakes. That is, a number of counterfoils or ticket stubs were to be drawn at random or pure chance from a wheel, the quantity of which would have been equal to the number of horses entered in The International. Each of those stubs would have then been assigned a name of one of the horses, all the names being used in the process. This process was to have been repeated, the number of repeti-

tions depending on the number of tickets sold.[1] The position of the first three horses at the end of the race would have determined the winning stubs. The person holding a ticket matching a stub bearing the name of a horse which ran first, second or third would have been the winner of the first, second or third prize respectively.

Because the lottery for which they printed the tickets would have been legal under a statute of the Republic of Haiti, the country where the lottery was to be operated, appellants contend that § 1953(a) did not apply to their shipments by reason of subsection (b). This subsection provides in pertinent part: "(b) This section shall not apply to . . . (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statute of that State . . . ." The shipments in question do not come within this subsection for two reasons: One, the lottery tickets were no more "betting materials to be used in the placing of bets or wagers on a sporting event" than

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1 The reverse side of each lottery ticket printed by appellants contained the following information:

DISTRIBUTION: The amount of money received from the sale of tickets for the Republic of Haiti Welfare Fund Sweepstakes will be distributed percentagewise.

10 percent and 15 percent of the funds will be used for the establishment over the territory of the Republic of Haiti for schools, hospitals, social and charity works.

Balance after deduction of administrative expenses will be distributed in prizes to ticket holders.

The amount available for prizes must be certified by auditors the day preceding the draw. If it exceeds $75,000.00 it will be divided in as many units of $75,000.00 as the sum admits. If prize money available for distribution is under or over the $75,000.00 unit, then prizes will be distributed proportionately.

PRIZES FOR EVERY $75,000.00 UNIT

WINNING HORSE	$25,000.00
SECOND HORSE	10,000.00
THIRD HORSE	5,000.00
Drawers of other horses divide as follows:	
Holders of Non-Running Horses each $250.00	15,000.00
Balance of $15,000 to be divided among holders of Non-Winning Horses	
50 CASH PRIZES DIVIDE	5,000.00
100 CASH PRIZES DIVIDE	5,000.00
500 CONSOLATION PRIZES DIVIDE	10,000.00
TOTAL PER UNIT	$75,000.00

are the materials used in a numbers game. See for example *Forte v. United States*, 83 F. 2d 612, 615 (C.A.D.C. 1936). And two, the word "State", as used in the subsection and as the district court took great pains to point out (241 F. Supp. at 278-280), means one of the United States, and not a country in the international sense. See *United States ex rel. Champion v. Ames*, 95 Fed. 453 (C.C. N.D. Ill., 1899), where the court refused to construe the word State in a statute (upon which § 1301 of Title 18 is derived) prohibiting the transportation of lottery tickets between States to include a territory of the United States.

In the alternative, appellants argue that to construe subsection (b) as we have, would make it unconstitutional. The reason asserted is that the subsection would then treat two acts differently when there is in fact no difference between them. If we assume for the purposes of argument that the acts are the same, appellants have failed to demonstrate that any lack of uniformity in treatment by the subsection is inappropriate to any proper legislative purpose. See *Boylan v. United States*, 310 F. 2d 493, 500 (C.A.9, 1962).

Appellants assert a number of grounds as to why the district court erred in refusing to allow their motion to suppress evidence of the lottery tickets.[2] The printing of the lottery tickets by appellants was illegal.[3] They concede this much by admitting that the characteristics of the lottery which was to be conducted with those tickets are similar to those of a wagering pool based on the outcome of a sporting event. Consequently the tickets were subject to a reasonable search and seizure. But this fact does not

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2 The grounds asserted are as follows: A. The information contained in the affidavit to procure the warrant was stale; B. There was no basis in the affidavit upon which the alderman could find that the un-named informant was credible or his information reliable; C. The sum total of the facts communicated to the alderman, both oral and written, were insufficient in law for the alderman to find probable cause for the issuance of the search warrant; D. The alderman did not make an informed and deliberate determination as to probable cause; and E. The warrant was illegally executed in that the property not described in the warrant was seized merely as evidence.

3 See 18 U.S.C.A. § 1953(a)(b), set forth in footnote 5, post.

convict them of the crime charged in the indictment. The prosecution must still have proved them guilty with relevant evidence which was both admissible and sufficient to meet the charge in the indictment. Since evidence of the lottery tickets and related items at least contributed to the conviction, it becomes necessary for us to determine whether that evidence should have been suppressed. Upon our independent examination of the evidence in the record,[4] we are satisfied that the district court did not err in denying the motion to suppress.

Appellants next contend, and this is their main point, that the stipulation of facts is insufficient to prove the crime set forth in each count of the indictment. Except for the dates on which the shipments of lottery books are asserted to have occurred, Counts I and II are identical. In substance these counts charge that the appellants did willfully transport and cause others to transport lottery books in interstate commerce knowing that they were to be "adapted, designed and devised for use in a numbers, policy, bolita or similar game based upon the outcome of a sporting event." Appellants maintain that the lottery for which the books of tickets were printed is not the same as or similar to the games of numbers, policy or bolita.[5]

A lottery is a scheme for the distribution of a prize or prizes by lot or chance, the number and value of which is determined by the operator of the lottery. The simplest form of which is the well-known raffle wherein a prize is awarded to the person holding the ticket, the number or name upon which corresponds to that on the counterfoil or

4 "When constitutional rights turn on the resolution of a factual dispute we are duty bound to make an independent examination of the evidence in the record. See, e.g., *Edward v. South Carolina*, 372 U.S. 229, 235; *Blackburn v. Alabama*, 361 U.S. 199, 205, n. 5." *Brookhart v. Janis*, U.S. , , n. 4 (1966).

5 Section 1953(a) provides: "(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bill, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both."

ticket stub drawn at random from a container in which have been placed the stubs of all the tickets distributed. A ticket, often referred to as a chance, is usually sold for a fixed price to the buyer. Unless limited by the operator of the raffle, the buyer may purchase as many chances as he wishes. And unless the prize is made proportional to the number of tickets sold, the value of the prize awarded is independent of the number of chances purchased by any individual even though the odds of his winning the prize may be increased thereby. There is of course the possibility that receipts from sales will not cover the amount of the prizes and expense of operating the raffle. But if such a possibility does occur, the operator can call the raffle off and return the amounts paid for the tickets sold. This, however, is so rare an event, the operator can be said to be the holder of a wagering pool, paying out the prizes from the pool, and pocketing the remainder less expenses. Hence a raffle is a convenient way of raising money by the operator. When the sale of chances is not limited to any locale and a formula is used for determining the winning ticket, the scheme is referred to as a lottery, such as the one which was to be conducted here.

In contrast, "numbers" or the numbers game is that game wherein the "player" wagers or plays that on a certain day a certain series of digits will appear or "come out" in the series, such as the United States Treasury balance or parimutuel payoff totals of particular races at a certain racetrack for the day,[6] used as a reference. Though the number of digits is fixed, usually at three, any player is free to select any number or quantity of numbers within the

6 Parimutuel payoff totals offer a convenient reference. They give the player a chance to indulge in another form of the numbers game. That is, he may play any one, two or three digits, one at a time. Playing numbers in this fashion is called "playing the leads". The first digit is obtained from the parimutuel payoff totals of the first three races, say at Aqueduct, which are completed around 2:30 p.m.; the second from the totals of the first five races, at about 3:30 p.m.; and the third from the totals of the first seven races, which are over between 4:30 and 5:00 p.m. The results, besides being tamperproof, usually appear in newspapers of wide circulation, thereby giving the player who has not gone to Aqueduct that day an opportunity to check the digits which have been used to obtain the winning numbers for that day.

range of those digits, and designate the amount of his wager upon each. Thus, it is possible for a number of people to play the same number while other numbers go unplayed. The probability odds, for example, of predicting that a certain three digit number will come out is a thousand to one. However, the person, known as the backer or "banker", who guarantees the payoffs to the successful player or players, predetermines the rate of the payoffs, which in most instances is pitifully less than the true odds. In such a game neither the number of winning players nor the total amount of the payoffs can be predicted in any one day. Thus, in a single day it is possible for the payoffs to be larger than the total sum wagered. On the other hand at the other extreme it is possible to have no payoffs because no one played the number that came out.[7]

Policy and bolita differ from the numbers game in the method of determining the winning sequence or combination of digits. In policy, it is ascertained by the drawing at random from a wheel in which tags, each bearing one of the possible combinations of numbers that can be played, have been placed. The game is sometimes played in conjunction with a lottery, the winning combination of numbers being taken from the end digits of the number printed on the winning ticket drawn in the lottery. 38 C.J.S. Gaming § 1, pp. 41-42; 54 C.J.S. Lotteries § 10, p. 856. Bolita is different from policy in that the numbers which may be played are restricted to two digits.[8] The name bolita is the diminutive of ball in Spanish.[9] Originally, and perhaps in some localities today, the winning number combination was ascertained by the drawing of one of the balls at random from two bags each containing ten little balls numbered from "0" to "9".

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7 For a description of the manner in which the numbers game is played, see *Forte v. United States*, 83 F. 2d 612 (D.C. Cir. 1936); *Commonwealth v. Banks*, 98 Pa. Super. 432 (1930).

8 For a more detailed description of how bolita is played, see *Pinder v. United States*, 330 F. 2d 119, 121.

9 Webster's Third New International Dictionary, Unabridged.

More specifically, appellants say that the characteristics of numbers, policy and bolita, which they claim do not apply to lottery, are well-known, and are as follows: (1) The player selects the number upon which he will wager; (2) The player designates the amount of his wager; (3) The rate of the payoff is predetermined by the backer; and (4) The risk of the wager is borne by the backer.

Granted that the first three characteristics exist, we think there are similarities, taking into account the way the numbers game is played, between the lottery in question and policy, one of the numbers games set forth in the indictment.[10] It must be remembered that the numbers game is played almost every weekday of the year, while the lottery here was to be a single event which could have taken place but once in a year's time. If one were to record over a year's time, the gross profit made by the backer of a numbers game, it will be found that its percentage of the total amount played would approximate the percentage of the difference between the rate of the payoff to winning players and the true rate. Because of the great disparity between rate of payoff and the true rate, the risk of a backer losing money on payoffs alone over a year's time is practically nil. Thus, the backer is like the holder of a wagering pool, taking his percentage of the amount wagered for his troubles and returning the remainder to the successful players. In this respect there is no difference between the backer and the operator of a lottery. Since the backer is almost assured of a return, the players in effect are not wagering against him, but against each other as in a lottery.

Moreover in the lottery which was to be operated here, since each of the lottery tickets bears a serial number different from the others, each buyer of a ticket would have wagered the other buyers that his ticket stub would be drawn and win a prize according to the method which was

10 As far back as 1930, it was judicially announced that "The great weight of authority is that 'policy' playing is a lottery." *Commonwealth v. Banks*, 98 Pa. Super. 432, 436 (1930).

to be used to determine the winning ticket. Therefore, each buyer would have wagered that a stub bearing that number, whatever it may have been, would at least be drawn. This is the way the policy game is sometimes played.

We think these similarities are sufficient to bring the proof in harmony with each count of the indictment.

Accordingly, the judgment of conviction and sentence regarding the appellant in each case will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court be, and the same is hereby affirmed.

ATTEST:

/s/ IDA O. CRESKOFF
Clerk

July 28, 1966

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 592

MURRAY B. BAKER AND VICTOR O. GATES, SR.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 364 F. 2d 107. The opinion of the district court is reported at 241 F. Supp. 272.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1966. A petition for rehearing was de-

nied on August 25, 1966. The petition for a writ of certiorari was filed on September 24, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The provisions of 18 U.S.C. 1953 are set forth at page 4 of the petition.

QUESTIONS PRESENTED

1. Whether there was a sufficient basis for the issuance of a warrant to search petitioners' business premises.

2. Whether articles not described in the search warrant were improperly seized.

3. Whether the stipulated facts support petitioners' conviction.

4. Whether the exception in Section 1953(b)(2) for the transportation of material for use in wagering on sporting events into a State where such betting is made legal by statute applies to the transportation of lottery tickets to Haiti.

STATEMENT

After a trial by the court on stipulated facts, in the United States District Court for the Middle District of Pennsylvania, petitioners were convicted of interstate transportation of wagering paraphernalia (two counts) and of conspiracy. Petitioner Baker was fined $2,000 on count 1, and sentenced to three years' imprisonment (count 2), followed by three

years' probation (count 3). Petitioner Gates was sentenced to three years' probation on all counts (App. 2a, 83a-84a).[1] The court of appeals affirmed.

It was stipulated that on two dates in July 1962 petitioners shipped from Harrisburg, Pennslyvania, via New York City, to Port au Prince, Haiti, a quantity of lottery tickets to be used and designed for use in a lottery legally operated in Haiti. It was also stipulated that, on January 8, 1963, under authority of a State search warrant, federal and State officers entered petitioners' printing plant in Harrisburg and seized the following items: lottery tickets, slips, papers and writings, printed by petitioners, to be used and designed for use in the Haiti lottery; plates to be used in printing those papers; and certain freight bills (App. 58a-62a). Petitioners' motion to suppress the seized material, on the ground, *inter alia*, that the sworn complaint failed to show probable cause, was denied (App. 57a-58a).[2]

The warrant for the search of petitioners' premises was based upon the affidavit of a Harrisburg police detective, dated January 8, 1963 (App. 13a-15a). The detective averred, "from his own personal knowledge based on observations, surveillance and investigation" and from information which he believed to be correct, that there was probable cause to believe that petitioners possessed lottery paraphernalia at a

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[1] "App." refers to the Appendix filed in the court of appeals.

[2] While stipulating to the facts which were developed as a result of the search, petitioners expressly preserved for appeal their objections to the search warrant and its execution (App. 63a).

specified address in Harrisburg. He further alleged that information that lottery tickets were being printed in petitioners' shop had been received from a reliable and confidential source and had been corroborated by surveillance of the premises, which revealed that it was frequented by known lottery operators to whom petitioner Gates transferred various packages.

At the hearing on petitioners' motion to suppress, the State official who had issued the warrant and the detective who had filed the underlying affidavit testified as to the evidence the latter had given, in addition to the sworn compliant, to support the warrant. Other officers testified as to the information which they had given the detective prior to his affidavit. The substance of this testimony was as follows: Information had been received confidentially on about November 15, 1962, from a previously reliable source, that lottery tickets were being printed on the premises in question and that petitioners were operating the press. As a result of this information, the police rented a nearby room in the same building around the first of December 1962 and maintained a check as to persons entering the building and the room occupied by the printing press. This surveillance continued to January 8, 1963, when application was made for the warrant. Petitioner Baker, one of the incorporators of the Industrial Press, which was operated by petitioner Gates, had a prior arrest for failure to obtain a gambling stamp. Both petitioners and a known lottery operator named Crawl were frequently seen entering and leaving the establish-

ment (App. 16a-34a). On one occasion, after petitioners received a box from Crawl, Baker was seen, through binoculars, taking what appeared to be "Treasury Balance" lottery tickets from the box, sorting and stapling them, and placing them in cellophane bags (App. 38a-39a, 43a-44a). Information was also received from a postal inspector that lottery material was being mailed from the address in question (App. 37a).

ARGUMENT

1. Petitioners' attack on the sufficiency of the affidavit underlying the search warrant is without merit. The affidavit, read in the required "common sense" fashion,[3] was sufficient on its face to show probable cause. The delay between the time the police received the confidential information concerning petitioners' activities and the time the search warrant was obtained does not render the warrant defective; the affidavit reveals that, during that time, the police were engaged in efforts to corroborate the information given them. Unlike the situation in *Aguilar* v. *Texas*, 378 U.S. 108, the affidavit here did not contain only a bare statement of belief. In addition, it showed that the informant's report was corroborated by actual surveillance of the premises to be searched.

The additional oral testimony presented to the magistrate served merely to amplify the affidavit,

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[3] *United States* v. *Ventresca*, 380 U.S. 102, 108-109; see, also, *Jones* v. *United States*, 362 U.S. 257; *Rugendorf* v. *United States*, 376 U.S. 528.

which was in itself a sufficient basis for issuing the search warrant. *Poldo* v. *United States*, 55 F. 2d 866, 868 (C.A. 9), relied on by petitioner, makes clear that such evidence, complementary to the affidavit, is properly admissible. Cf. *Aguilar* v. *Texas*, *supra*, 378 U.S. at 109, n. 1.

2. Petitioners contend that two freight bills, showing shipments of printed pads from the Industrial Press to Port au Prince, Haiti, via New York (App. 64a-65a), were improperly seized because they were not specifically mentioned in the warrant. Among the items mentioned in the warrant, however, were "other paraphernalia used in the operation of a lottery" (App. 12a). This phrase, we submit, is broad enough to cover freight bills for the transportation of lottery tickets. Moreover, "it is well established that given a lawful search some things may be seized in connection therewith which are not described in the warrant, * * *" for example, instrumentalities of the crime. *Palmer* v. *United States*, 203 F. 2d 66, 67 (C.A.D.C.); *Johnson* v. *United States*, 293 F. 2d 539, 540 (C.A.D.C.), certiorari denied, 375 U.S. 888; *Bryant* v. *United States*, 252 F. 2d 746, 749 (C.A. 5). The documents in question, which were used to effect the proscribed interstate and foreign transportation, were seizable as instrumentalities of the offense charged. *Marron* v. *United States*, 275 U.S. 192.

3. Counts 1 and 2 of the indictment charged that petitioners caused to be transported in interstate and foreign commerce "books of lottery tickets, slips, papers and writings, knowing that said books * * *

were used, to be used, and adapted, designed and devised for use in a numbers, policy, bolita or similar game based upon the outcome of a sporting event" (App. 2a-3a). Petitioners contend that the stipulation of facts fails to show that the papers they transported—while admittedly related to a "wagering pool with respect to a sporting event" (see 18 U.S.C. 1953 (a) (b))—were connected with a numbers, or similar, game, as charged. This contention is without merit. As the court below carefully pointed out (Pet. App. A5-A8), there are many similarities between a numbers game and a sweepstakes, both of which are lotteries. The three categories of wagering operations described in Section 1953(a) were not intended to be mutually exclusive. Thus, bookmaking, as well as a lottery, might also involve a wagering pool with respect to a sporting event.

Petitioners were in no way prejudiced or misled by the form of the indictment. That they knew the charges which they were required to meet is evidenced by their pre-trial stipulation as to the facts, and it is clear that their conviction would bar any subsequent prosecution for the same conduct. See *Hagner* v. *United States*, 285 U.S. 427, 431; *United States* v. *Debrow*, 346 U.S. 374, 376.

4. Petitioners do not deny that their conduct, as revealed by the stipulation of facts, is prohibited by Section 1953(a). They contend, however, that that conduct fits within the exception, under Section 1953 (b) (2), for "the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal